Supreme Court, U.S.
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No. 96-997

In The

Supreme Court of the United States

October Term, 1996

JONATHAN WOODNER CO., et al.,

Petitioners,

v.

FRANCISCA BREEDEN, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The District Of Columbia
Court Of Appeals

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

If this Court concludes: (i) this petition is timely; (ii) that the constitutional issue it presents was presented or passed on below; and (iii) that the U.S. Courts of Appeal are divided on the resolution of the issue, the question then remaining is:

> Whether the Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931) and by every U.S. Court of Appeals to reach the issue, allows an appellate court to invoke its statutory authority to order a partial new trial limited solely to the issue of punitive damages.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents, Francisca Breeden, *et al.*, respectfully pray that the Court deny a writ of certiorari to review the order of the District of Columbia Court of Appeals entered in this proceeding on August 8, 1996.

STATEMENT OF THE CASE

This case is the second of two filed by these petitioners (defendants in the trial court) one month apart. (See Docket No. 96-821). The first petition, presenting a jury selection issue, seeks review of a judgment entered by the District of Columbia Court of Appeals on September 14, 1995. This petition purports to seek review of an August 8, 1996 order in which the Court of Appeals simply elaborated its reasons for entering the September 14, 1995 judgment. Petitioners waited until December 22, 1996, to seek review by certiorari of the August 8th order – purporting to grant themselves an extention of time for filing this second petition for certiorari by filing a *second* petition for rehearing in the Court of Appeals. Petitioners then filed their second petition for certiorari with this Court within ninety days after their second petition for rehearing was denied.

A. Bifurcated First Trial Requested By Petitioners

Respondents (successful plaintiffs in the trial court) initiated these proceedings by filing a complaint in September of 1980. For more than sixteen years since then they have been attempting to bring this matter to closure.

The appellate court described the complaint as:

> an action seeking damages for nuisance and intentional infliction of emotional distress grounded in allegations of poor housing conditions *and intimidation by the landlord* in attempting to convert the premises from rental to condominium use at Park Tower, an apartment building in Washington, D.C., brought by former tenants ('tenants') against three defendants . . . : the owner of Park Tower, the Jonathan Woodner Company ('Woodner Co.'); the estate of the Vice-President of the Woodner Co., Jonathan Woodner ('Estate'); and Steven Z. Laufer . . . (underlining added)

Jonathan Woodner Co. v. Breeden, 665 A.2d 929, 931-32 (D.C. 1995).

After a nine year delay, because of "discovery delays, stays due to the pendency of related actions, and a mistrial following Jonathan Woodner's death," *id.* at 933, the matter proceeded to judgment. At defendants' request, trial of the case was bifurcated, with trial on liability and compensatory damages commencing first. At its conclusion the jury returned a verdict, totaling $965,000, on all claims and counterclaims in favor of all nine plaintiffs. After a two-week recess, and a separate trial on punitive damage issues, the jury returned verdicts against each

defendant in amounts ranging from $1.5 million to $9 million.

B. Unitary New Trial Not Demanded In Post-Trial Motions

The defendants filed post-trial motions. None of their motions alleged an entitlement to a new trial on *all* issues if the trial court set aside the judgments for punitive damages.

On March 23, 1989, the trial judge issued a lengthy opinion denying the motions and concluding:

> There was no miscarriage of justice when the jury acted within its province in crediting plaintiffs' testimony and rejecting defendants' presentation. Neither was there a miscarriage of justice when the jury gave its collective view of the dollar value of such unmeasurables as annoyance, discomfort and emotional distress nor when it gave its collective view on the amount of money which would deter future conduct of the type displayed by the evidence in this case.

(R.5645)*

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* "R" refers to the record filed with the D.C. Court of Appeals. "App." refers to the appendix to the petition for a writ of certiorari. "Pet." refers to the petition itself.

C. Unitary New Trials Not Requested In Appellate Briefs Or At Oral Argument

In separate and joint briefs to the D.C. Court of Appeals, each defendant paid particular attention to the judgments for punitive damages. None, however, argued that "The Seventh Amendment [does not] permit [ ] a partial retrial limited to the question of punitive damages . . . " Pet. at 5. Each defendant also filed a reply brief. Again, none of those briefs argued that if the judgments for punitive damages were reversed, defendants were entitled to a new trial on all issues.

Nor did any defendant make that claim at the oral argument of the appeal.

On September 15, 1995, the appellate court issued its decision and judgment. It expressly affirmed the compensatory damages judgment for intentional infliction of emotional distress. *Id.* at 943 ("The judgment for compensatory damages for intentional infliction of emotional distress is affirmed.")

However, the court announced new law on punitive damages – (1) requiring proof of liability by "clear and convincing" evidence, and (2) requiring a plaintiff who seeks to recover punitive damages based upon wealth, to show the defendant's "net worth" at the time of trial. The decision retroactively applied those new evidentiary and liability standards to this then-fifteen year old case. The appellate court also ruled that punitive damages could not be recovered against a decedant's estate. The punitive damages claims were remanded for a new trial.

The parties filed timely cross-petitions for a rehearing or rehearing *en banc* of the punitive damages issues.

D. Absolute Right To Unitary New Trial Not Claimed In Opposition To Emergency Motion Or In Second Petition For Rehearing

The petitions for rehearing did not in any way challenge the appellate court's affirmance and entry of judgment on the compensatory judgments for intentional infliction of emotional distress. Moreover, in the District of Columbia Court of Appeals it sometimes takes many months, or even years, before a ruling issues on a petition for rehearing. To avoid that delay, plaintiffs filed an "Emergency Motion For Issuance Of Mandate To Permit Execution On Judgment For Compensatory Damages."

Defendants opposed plaintiffs' motion. However, they did not contend that, *as a matter of law,* plaintiffs could not execute on their judgments because defendants were entitled to a re-trial of all issues. Instead, adopting case law of the Court of Appeals, they acknowledged that the scope of a retrial "is a question 'that should be decided by the particular litigation.' " Opposition at 5. They urged that on remand the trial court be tasked to determine "whether the trial could be fairly limited to the issue of punitive damages alone." *Id.*

Before the appellate court ruled on the Emergency motion, an order issued on July 27, 1996 denying the parties' cross-petitions for rehearing on punitive damages. Defendants obtained a thirty day extension of time, to November 22, 1996, from Chief Justice Rehnquist to file a petition for certiorari. On November 22 defendants

docketed No. 96-821, seeking review of the September 14, 1995 judgment, but limiting the "Question Presented" to a jury selection issue.

On August 8, 1996, the appellate court issued an order relative to the then-moot Emergency motion. The order elaborated on its reasons for entering partial judgment for plaintiffs on September 14, 1995. In explanation, the court cited its statutory "authority to order relief," Pet. at 3a, including its authority to "affirm . . . any order or judgment . . . [and to] require such further proceedings to be had, as is just in the circumstances." *Id.* Finally, citing its superior familiarity "with a record that includes thousands, upon thousands, of pages of transcript and other papers," Pet. at 5a, the appellate court rejected defendants' claim that plaintiffs should not be permitted to execute on their partial judgment for compensatory damages because a new trial on all issues might be appropriate.

On August 22, 1996, defendants filed what purported to be a *second* petition for rehearing or rehearing *en banc*. The petition requested reconsideration of the explanatory August 8 order. The petition did not contend that, as a matter of law, a retrial of all issues was required when a judgment for punitive damages is reversed and remanded. Indeed, it argued that the scope of a retrial is such a fact-bound issue that "a trial judge's discretion is needed on the issue because a trial judge can do what this Court cannot: hold a hearing and take evidence." Appellants' Petition For Rehearing Or For Rehearing En Banc Of The Panel's August 8, 1996 Order at 7 n.3.

E. Untimely Petition For Certiorari

On December 4, 1996, the appeals court denied the second "rehearing petition" without comment. On December 22, 1996 – thirty days after the extended deadline granted by Chief Judge Rehnquist for seeking review of the September 15, 1995 judgment – defendants filed the present petition.

REASONS FOR DENYING THE WRIT

This petition for a writ of certiorari to review the August 8, 1996 Order of the D.C. Court of Appeals should be denied for three reasons.

First, the petition is untimely. Defendants failed to seek review, by November 22, 1996, of the September 5, 1995 judgment (as they could have) on grounds that: "The Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), [does not] allow[ ] a partial new trial limited solely to the issue of punitive damages." Pet. at i. Their attempt to evade this court's time requirement by filing successive petitions for rehearing should not be countenanced.

Second, the "Question Presented" was not presented to or passed on by the District of Columbia Court of appeals.

Finally, neither the September 15, 1995 judgment nor the August 8, 1996 order "conflict" with *Champlin*. Nor are the U.S. Courts of Appeal divided in their answer to the "Question Presented." *Every* circuit that has had

before it the question of whether to affirm or order a new trial limited to the issue of punitive damages has exercised its discretion affirmatively.

I. THE UNTIMELY FILING OF THE PETITION DEPRIVES THIS COURT OF JURISDICTION OVER THE CASE

This Court may exercise jurisdiction over "[f]inal judgments or decrees" rendered by the District of Columbia Court of Appeals. 28 U.S.C. §1257. A petition for writ of certiorari to secure review must be "applied for within ninety days after the entry of such judgment or decree." 28 U.S.C. §2101(c). However,

> if a **petition** for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . .

Sup. Ct. R.13.3.

Even after the denial of a petition for rehearing, the time to file a petition for certiorari may be extended by a justice of this Court "for a period not exceeding sixty days." 28 U.S.C. §2101(c).

The D.C. Court of Appeals rendered its only "judgment or decree" in this matter on September 14, 1995. The defendants filed a timely petition for rehearing in the appellate court. That petition was denied on July 25, 1996. Defendants then sought an extension of time to file a petition for certiorari in this Court. On October 11, 1996 Chief Justice Rehnquist extended the deadline for filing a petition to November 22, 1996.

On November 22, 1996, defendants did file a petition for certiorari with this Court (No. 90-861). But the "Question Presented" in that petition does not include a challenge to the entry of judgment for compensatory damages for intentional infliction of emotional distress on Seventh Amendment grounds. It, instead, addresses a jury selection issue.

Defendants are attempting an end-round challenge to the entry of judgment, on Seventh Amendment grounds, by the *present* petition which was filed on December 22, 1996 – thirty days after the generous extension of time granted by the Chief Justice.

Defendant-petitioners argue that they seek review of the August 8, 1996 order of the Court of Appeals. They contend that because they filed a second petition to rehear that Order on August 22, 1996, and then filed their petition for certiorari within three weeks after their second rehearing petition for rehearing was denied, this second petition is timely.

They are wrong for three reasons. First, if they lose on the jury selection issue (as they are certain to), the judgment for compensatory damages will be affirmed and plaintiffs will be able to execute on the judgment. This Court, then, will be unable to provide defendants with any meaningful relief. There is no point in relitigating liability for compensatory damages after the plaintiffs have collected their money damages.

Second, in the D.C. Court of Appeals a petition for rehearing will only lie to challenge the "entry of judgment" for a party. D.C. App. R.40(a); *see* 16 Charles A. Wright, Arthur R. Miller, Edward H. Cooper & Eugene

Gressman, *Federal Practice and Procedure* §3986 at 471 (1977) (purpose of petition for rehearing is "to change and modify a prior judgment"). Defendants' miscaptioned "petition for rehearing" was directed at a court order, one that was issued *after* the entry of judgment. Their filing could not, therefore, be a "petition for rehearing" and could not toll the time for filing a petition for certiorari with this court. Sup. Ct. R.13.3. The deadline for seeking review by writ of certiorari of the August 8 order was November 8, 1996 (or November 22 after the Chief Justice extended the deadline). This December 22, 1996 filing comes too late.

Third, assuming the document defendants filed in the Court of Appeals could be characterized as a *bona fide* second petition for rehearing, it was ineffective to toll the time for filing a petition for certiorari under this Court's Rule 13.3. Rule 13.3 tolls the time for filing a petition for certiorari on only *one* occasion when a petition for rehearing is filed. Sup. Ct. R.13.3. ("[I]f *a petition* for rehearing is filed in the lower court . . . the time to file a petition for a writ of certiorari . . . runs from the date of the denial of the petition for rehearing . . . ")

If the Court's rule were otherwise, and tolled the time each time a party filed a petition for rehearing, any party seeking review of a state court judgment could grant himself as much time to file a petition for certiorari as he desired. By filing multiple petitions for rehearing, on the same or on various grounds in the lower court, the date for filing a petition for certiorari could be extended *ad infinitum*. Rule 13.3 sensibly prevents that practice by

granting a single dispensation to file a petition for rehearing that will act to toll the time to file a petition for certiorari with this Court.

For these reasons the present petition is untimely and this Court lacks jurisdiction over it. *Missouri v. Jenkins*, 495 U.S. 33 (1990).

II. THE CONSTITUTIONAL ISSUE THE PETITION PRESENTS WAS NOT PRESENTED TO OR PASSED ON BY THE D.C. COURT OF APPEALS

Lack of jurisdiction is not the only obstacle preventing review. It is settled that this "Court will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

The "Question Presented" by the present petition raises for the first time in this litigation the issue of whether, *as a matter of law*, a trial and appellate court are barred by the Seventh Amendment from "allow[ing] a partial new trial limited solely to punitive damages":

> Whether the Seventh Amendment to the Constitution, as interpreted in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), allows a partial new trial limited solely to the issue of punitive damages.

Pet. at i. *See* Sup. Ct. R.14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.")

Presumably, defendants have framed the issue as one of law, rather than of fact or discretion, to entice this

Court to grant review. Sup. Ct. R.10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.")

The clear consequence of that strategy is that, in violation of a number of D.C. Court of Appeals rules, and this court's jurisprudence, defendants have presented a constitutional question and claim here that was never presented below.

At the briefing stage in the D.C. Court of Appeals, D.C. App. R.28(a)(6) require appellants to include in their brief a "short conclusion stating the precise relief sought." No defendant sought, anywhere in their brief, a trial on all issues if the judgment for punitive damages, alone, was reversed and remanded.

In their opposition to plaintiffs' Emergency motion in the appeals court, defendants relied on two D.C. Court of Appeals decisions – *Merrell Dow Pharmaceuticals, Inc. v. Oxendine*, 593 A.2d 1023 (D.C. 1991) and *Robinson v. Sarisky*, 535 A.2d 901 (D.C. 1988) – to argue that the *Champlin* issue was a factual one, requiring a finding as to what was fair:

> The question of whether 'punitive and compensatory damage claims are separate and distinct' or 'so interwoven that they cannot fairly be separated . . . ' is *a question that 'should be decided by the particular litigation.' Oxendine*, 593 A.2d at 1027. Therefore, on remand in this case the trial court would have to determine as an initial matter whether a trial could fairly be limited to the issue of punitive damages alone.

Opposition at 5.

In their miscaptioned Petition For Rehearing, the defendants again urged the D.C. Court of Appeals to treat the issue as a factual one – as to which *discretion* and judgment, rather than a rule of law, controlled. Defendants went so far as to request an *evidentiary* hearing on the *Champlin* issue and to urge that an appellate court is not equipped to address the issue:

> [T]he panel's decision to address the Seventh Amendment itself, rather than permitting the trial court to address it in the first instance, is puzzling . . . [A] trial judge's discretion is needed on the issue because a trial judge can do what this Court cannot: hold a hearing and take evidence.

Petition For Rehearing at 7 n.3. (emphasis supplied)

The strictly legal "Question Presented" by the present Petition is very different from the factual issue defendants shaped for the D.C. Court of Appeals. The two issues "are not in anywise necessarily connected . . . " *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899), quoted in *Illinois v. Gates*, 462 U.S. 213, 218 n.2 (1983).

In this case the D.C. Court of Appeals relied on the authority granted it in a statute enacted by Congress, D.C. Code §17-306 (1996), 84 Stat. 565, Pub. L. 91-358, Title I, §146(a)(6), to enter partial judgment and to remand this matter for trial on punitive damages alone. Pet. at 3a. If defendants had argued (as they do for the first time here) that, as a matter of law, the statute as applied in this case is unconstitutional, a number of things would have happened. First, D.C. App. R.52 would require defendants "to give immediate notice in writing" of that extraordinary claim, so that the Clerk of

the Court could "certify such fact to the Attorney General." *Id.*

Nothing of the kind happened here because the defendants never contended that a strictly legal issue was presented by their second "Petition for Rehearing."

This Court has explained the policy reasons for its "presented or passed on" rule on a number of occasions:

> Questions not raised below are those on which the second is very likely to be inadequate . . . And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality.

Cardinale, 394 U.S. at 437. For both of the above reasons this Court does not, and should not, exercise jurisdiction over petitions such as this one.

III. THERE IS NO CONFLICT WITH *CHAMPLIN* AND THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE "QUESTION PRESENTED"

In the body of their Petition, the defendants alternate between adherence to the assertion inherent in their "Question Presented" – that, as a matter of law a court may not order a new trial limited solely to the issue of punitive damages – and an effort to make a factual showing [although a conclusory one] that it would be prejudicial to re-try punitive damages alone, in this particular case. The defendants' effort to invoke *Champlin* to support either effort is unavailing because its purpose and

holding are perfectly consistent with the ruling in this case.

The defendants' efforts to marshal Circuit Court authority that contradicts *Champlin's* reasoning is similarly unavailing. Every U.S. Court of Appeals, and every treatise we have found, rejects the notion that an appellate court does not have the discretion to reverse and remand for trial of punitive damages alone.

A. The Ruling In This Case Is Perfectly Consistent With *Champlin*

The Seventh Amendment to the Constitution provides two protections: (1) it safeguards the right to "trial by jury," and (2) it prohibits "re-examination" of facts except under limited circumstances:

> In Suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., Amdt. 7.

In *Champlin* the petitioner alleged a violation of the "re-examination" clause. Because at common law there was no practice of setting aside a verdict in part, the petitioner claimed the U.S. Court of Appeals for the First Circuit erred when it affirmed a jury's finding of liability for breach of contract, reversed its award of damages, but remanded for only a partial new trial: limited to ascertainment of damages.

This Court rejected the claim that the appellate court erred, as a matter of law, in ordering a partial new trial.

Id. at 498 ("[T]he Seventh Amendment does not exact the retention of old forms of procedure."). The Court held that the Seventh Amendment only requires that "in trial by jury . . . issues of fact be submitted with . . . instructions and guidance . . . " *Id.* at 498.

Consistent with its holding, this Court provided "guidance" for determining when ordering a partial trial would be consistent with Seventh Amendment concerns. First, the Court pointed to whether the issue to be retried was "distinct and independent of the others." *Id.* at 494. By that, the Court made clear, it meant "whether it was impossible from an inspection of the present record" to identify facts as to liability that must necessarily be known before a trial could be had as to damages. *Id.*

Because that is a factual issue, this Court undertook an extensive inquiry into the pleadings and evidence in the *Champlin* record and concluded that the questions of damages and liability in that record were so interwoven that the damage issue could not "be submitted to the jury independently of [liability] without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500.

The rule that emerges from *Champlin* is that an issue may be submitted to a jury, independent of others, if the issue is sufficiently "separable" that it can be submitted to a jury without "confusion and uncertainty."

Fed. R. Civ. P. 59(a) was drawn from the *Champlin* case. Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice And Procedure*, §2814 (1995). It is settled now that both trial and appellate courts can order

a new trial. *Id.* at 98. At either level the issue is one that calls for the exercise of discretion:

> Whether an appellate court should grant a new trial as to all or only some of the parties is a matter resting within its discretion. Similarly, it has a large discretion to grant a new trial as to all the issues, or a partial new trial.

6A James Wm. Moore, *Moore's Federal Practice* §59.06. *See also* Randy R. Koenders, Annotation, *Propriety Of Limiting To Issue Of Damages Alone New Trial Granted On Ground Of Inadequacy Of Damages – Modern Cases*, 5 ALR 5th 875 (1992) ("[I]t is generally agreed that an appellate court when remanding a cause for new trial because of error, may limit the scope of the new trial to the assessment of damages"); Annotation, *Separate Trial Of Issues Of Liability And Damages In Tort*, 85 ALR 2d 9, 14 (1962) (Issue of damages "may, in the discretion of the court, be tried before either the same or a different jury.")

Both the holding and reasoning in *Champlin*, and every commentor to address the subject, support the view that petitioners argued for in the appellate court (and have now spurned): whether a new trial can be limited to the issue of damages without causing "confusion and uncertainty" is a discretionary judgment. In this case the appellate court was peculiarly well equipped to make that judgment. App. 5a, 6a ("We think it unlikely that any judge of the trial court, new to this case, could become any more knowledgeable of the contents of this record than we are, having recently decided numerous related issues in the appeal.")

Champlin, therefore, is authority for *denying* a petition to grant a writ of certiorari to review the discretionary judgment that is reflected in the order of August 8, 1996.

B. Every Circuit Court of Appeals That Has Had Before It The Question Of Whether To Affirm, Or Order, A New Trial Limited To The Issue Of Punitive Damages Has Exercised Its Discretion Affirmatively

Despite *Champlin's* teaching, defendants make a remarkable claim:

> The overwhelming majority of lower courts to have addressed the issue – including the Third, Fourth, Fifth, Eighth, Ninth and Tenth circuits – have held *as a matter of law* that the Seventh Amendment entitles parties such as petitioners to insist that the same jury hear both . . . liability and compensatory damages on the one hand, and punitive damages on the other . . . (italics added)

Pet. at 7-8.

Intuitively, this cannot be true. A claim for punitive damages is particularly well suited for trial alone. As the appellate court explained in this case, there is no possibility of confusion or uncertainty precisely because proof of liability for punitive damages will require plaintiffs to reprise much of the evidence regarding the underlying tort they presented to the first jury. Pet. at 6a. Yet, as this Court has observed, liability for compensatory damages is readily separable from punitive damages. Damages for the former *must* be awarded if liability is found. Punitive damages, on the other hand, are never awarded as of

right. It is the product of a "discretionary moral judgment." *Smith v. Wade*, 461 U.S. 30, 51 (1983). In the District of Columbia, moreover, liability for punitive damages requires proof of tortious and malicious conduct by "clear and convincing" evidence.

Not surprisingly, then, every commentator to address the issue concludes the two issues are separable for trial before different juries. James D. Ghiardi & John J. Kircher, *Punitive Damages: Law And Practice* §12.11 (1996) ("If the case is appropriate for bifurcation of punitive damages, there is no constitutional bar to presenting that issue to a separate jury."); Linda L. Schlueter & Kenneth R. Redden, 1 *Punitive Damages* §6.3(B)(3d Ed. 1995) ("Although the issue of liability has been properly determined, a new trial can be heard on the punitive damages claim alone.")

It is, we think, a complete answer to defendants' claim that, as a matter of law, the Third, Fourth, Fifth, Eighth, Ninth and Tenth Circuits require the same jury to hear compensatory and punitive damages, to list the cases that flatly contradict that claim. With two exceptions (the Fifth and Tenth Circuits) we provide cases decided *after* the most recent case cited by defendants for the proposition that trial of punitive damages, alone, is not permitted in that Circuit. *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649, 663 (D.C. Cir. 1966) (*en banc*); *Vasbinder v. Scott*, 976 F.2d 118, 123 (2d Cir. 1992); *Smith v. Lightning Bolt Productions, Inc.*, 861 F.2d 363, 375 (2d Cir. 1988); *Brink's Inc. v. City of New York*, 717 F.2d 700, 702, 715 (2d Cir. 1983); *Woodson v. AMF Leisureland Centers, Inc.*, 842 F.2d 699, 705 (3rd Cir. 1988); *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1411 (4th Cir. 1992) (*en banc*); *Defender Industries, Inc. v. Northwestern Mutual Life Ins. Co.*, 938

F.2d 502, 507 (4th Cir. 1991) (*en banc*); *Maxey v. Freightliner Corporation*, 727 F.2d 350, 352 (5th Cir. 1984) (rehearing); *Atkinson v. Dixie Greyhound Lines, Inc.*, 143 F.2d 477, 480 (5th Cir.), *cert. den.*, 323 U.S. 758 (1944); *Grimm v. Leinart*, 705 F.2d 179, 183 (6th Cir. 1983); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1314 (7th Cir. 1985); *Pulla v. Amoco Oil Company*, 72 F.3d 648, 661 (8th Cir. 1995) (J. White, retired); *Robertson Oil Co., Inc. v. Phillips Petroleum*, 871 F.2d 1368, 1376 (8th Cir. 1989); *Morrill v. Becton, Dickinson And Company*, 747 F.2d 1217, 1225 (8th Cir. 1984); *Williams v. Armontrout*, 977 F.2d 437, 441 (8th Cir. 1992); *Morgan v. Woessner*, 997 F.2d 1244, 1257-59 (9th Cir. 1993); *Spaeth v. Union Oil Company of California*, 710 F.2d 1455, 1460 (10th Cir. 1983).

The decision of the Fifth Circuit in *Atkinson* is also binding on the Eleventh Circuit, because it was issued before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

Only two of the cases defendants rely on were handed down in their circuit after the most recent case for that circuit we have listed above. They are *Lanier v. Sallas*, 777 F.2d 1370 (5th Cir. 1985) and *Mason v. Texaco, Inc.*, 948 F.2d 1546 (10th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). But neither case addressed the issue presented by this petition.

In *Lanier* the issue was whether a claim for punitive damages is "an entirely separate and distinct cause of action", for purposes of appeal. *Id.* at 325. That is not the issue here. Just one year before *Lanier* was decided the Fifth Circuit rejected the knee-jerk rule defendants urge:

> The law is settled that an error at trial relating to one issue that does not affect the determination of other issues does not justify granting a new trial on any issue except the tainted one.

Eximco, Inc. v. Trane Co., 737 F.2d 505, 513 (5th Cir. 1980). That same year the Fifth Circuit expressly held that a ruling on whether punitive damages will be re-tried alone calls for a discretionary judgment:

> We find it to be an appropriate exercise of our discretion, to specify that any new trial granted should be limited to the issue of the amount of punitive damages to be awarded.

Maxey v. Freightliners Corp., 727 F.2d 350, 352 (5th Cir. 1984).

The decision of the Tenth Circuit in *Mason* also confirms what we have said. In that case the trial court decided that compensatory and punitive damages should be retried together. The appellate court confirmed that the ruling was a discretionary one: "[T]he trial court, upon remand, did not abuse its discretion in ruling that all issues of liability and damages were matters to be resolved by the jury." Thus, district courts in the Tenth Circuit are not under the illusion that the Seventh Amendment bars a retrial limited to the question of punitive damages. *E.G., Atencio v. City of Albuquerque*, 911 F.Supp. 1443, 1448 (D.N. Mex. 1995) (granting "new trial on the issue of punitive damages" rather than on all issues).

CONCLUSION

For the foregoing reasons, and because of the sixteen year delay in bringing this matter to closure, the petition for a writ of certiorari to the District of Columbia Court of Appeals should be denied.

Respectfully submitted,

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